

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN ALLAN CURRENT,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2004

No. 246039

Shiawassee Circuit Court

LC No. 02-008238-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct (CSC-II)<sup>1</sup> (victim under thirteen years of age) and first-degree criminal sexual conduct (CSC-I)<sup>2</sup> (victim under thirteen years of age). The trial court sentenced defendant to seven to fifteen years in prison for the CSC-II conviction, and twelve to thirty years in prison for the CSC-I conviction. Defendant appeals his convictions and sentences, and we affirm.

I. Victim's Prior Sexual Knowledge

Defendant argues that the trial court denied him his constitutional rights of confrontation and to present a defense when it prohibited the introduction of evidence regarding the victim's prior sexual knowledge. The decision to admit evidence under the rape-shield statute is reviewed for an abuse of discretion *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Michigan's rape-shield statute, MCL 750.520j, provides as follows:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only

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<sup>1</sup> MCL 750.520c(1)(a).

<sup>2</sup> MCL 750.520b(1)(a).

to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Though rape-shield statutes are typically invoked where the victim is an adult, our courts have ruled on the applicability of rape-shield statutes in child-sexual abuse cases. For example, this Court has held that, under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inference that the child victim obtained the unique sexual knowledge from the defendant. *People v Morse*, 231 Mich App 424, 436; 586 NW2d 555 (1998). The *Morse* Court held that evidence regarding a child's unique sexual knowledge is admissible if: "(1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainant[], and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding." *Id.* at 437.

Here, defendant attempted to introduce evidence that the victim had been sexually assaulted by two male residents of an adult foster care home.<sup>3</sup> However, due to incompetency and retardation, the charges were dropped against the two males.

The trial court found that there was not a conviction in the prior incident due to incompetency and retardation of the defendants. The trial court also ruled that there were more dissimilarities than similarities between the two incidents and that an admission of the prior incident would only cause confusion.<sup>4</sup>

Because there was no conviction arising from the prior incident and because the facts underlying the previous incident are not significantly similar to be relevant to the instant proceeding, *Morse, supra* at 437, we hold that the trial court did not abuse its discretion in excluding the evidence.

## II. Child Pornography

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<sup>3</sup> That she visited with her mother when she was four years old.

<sup>4</sup> In the prior incident, there were only allegations regarding penile/oral penetration, which occurred outside of the home. Here, there were allegations regarding penile/oral penetration, penile/vaginal penetration, penile/anal penetration and sexual contact, which occurred inside the home and which were displayed on the computer. The prior incident is substantially similar to only one of the current allegations, and therefore, does not fully rebut the sexual knowledge the victim displayed in this case.

Defendant maintains that the trial court abused its discretion when it admitted evidence regarding child pornography found on his home computer. We review a trial court's ruling regarding the admissibility of other acts evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be logically relevant to a matter at issue at trial; and, (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 391; 582 NW2d 785 (1998).

Here, the trial court admitted the child pornography evidence only for the limited purpose of showing that defendant may obtain sexual gratification from viewing naked children. Defendant's accessing and viewing child pornography was probative of defendant's intent and motive in touching the victim for the purpose of sexual arousal or gratification, which is an element of the CSC II charge. MCL 750.520c(1) and 750.520a(k). Thus, the evidence was offered for a proper purpose. We further conclude that the evidence is relevant. Evidence that defendant seeks sexual gratification by looking at children makes it more likely that he committed criminal sexual assault on this victim. We also hold that the probative value of the evidence substantially outweighed the danger of unfair prejudice. The evidence refuted defendant's claim that the victim manufactured her story because she wanted to live with her father. The evidence also assisted the jury in determining whether the victim fabricated her claim of being sexually molested. Additionally, the trial court instructed the jury that it was only to consider the above evidence for the limited purpose of determining whether defendant had a reason or motive to commit the crime. Thus, any possibility of undue prejudice was avoided by the trial court's limiting instruction to the jury. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). For the above reasons, we hold that the trial court did not abuse its discretion in admitting the other acts evidence pursuant to MRE 404(b).

### III. Defendant's Right to Counsel

Defendant says that the trial court denied him his rights to counsel and to be present at his *Ginther*<sup>5</sup> hearing. To preserve an issue for appeal, it must be raised before and addressed by the

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<sup>5</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because defendant asked about being forced to represent himself at the *Ginther* hearing, he preserved this issue. Whether a defendant was deprived of the right to counsel is a question of law and is reviewed de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). However, defendant failed to properly preserve the issue regarding his right to be present at the *Ginther* hearing, because he did not object to the trial court's determination that the continuation of the *Ginther* hearing was to be conducted by defendant from prison via telephone conference. The standard of review of a constitutional unpreserved issue requires that the defendant show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The right of a criminal defendant to be represented by counsel is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. An indigent criminal defendant is constitutionally guaranteed the right to counsel, but he is not entitled to have the attorney of his choice appointed simply by requesting a substitution of the attorney originally appointed to represent him. *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). The decision regarding substitution of counsel is within the sound discretion of the trial court, upon a showing of good cause and that the substitution will not unreasonably disrupt the judicial process. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

The right of self-representation is also recognized by our Constitutions and by statute. *People v Russel*, \_\_\_ Mich \_\_\_; 684 NW2d 745 (2004). In exercising the right to self-representation, a defendant necessarily waives his right to counsel. *People v Dennany*, 445 Mich 412, 427; 519 NW2d 128 (1994). Before a trial court allows a defendant to proceed in propria persona, the court must determine whether the defendant intentionally relinquished his right to counsel. *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996) overruled in part on other grounds *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). The trial court must indulge every presumption against waiver and may not presume waiver from a silent record. *Id.* Three requirements must be met before the court may conclude that a defendant has waived his right to counsel and allow a defendant to proceed in propria persona: (1) the defendant's request for self-representation must be unequivocal, (2) the assertion of the right to proceed without counsel must be knowing, intelligent, and voluntary, and (3) the defendant's self-representation must not disrupt, inconvenience, or burden the court. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

Here, defendant terminated his trial attorney and, in the middle of the *Ginther* hearing regarding his trial attorney's ineffectiveness, requested to be relieved of his newly appointed attorney, not because his new lawyer was ineffective, but because defendant disagreed with his strategy. The trial court informed defendant that terminating his counsel would be a mistake and that if he did terminate his counsel, that he would be representing himself. After this advice, defendant agreed to these terms and to proceed with the *Ginther* hearing. Therefore, defendant was not denied his right to counsel, but rather, was denied his request to substitute counsel. To allow defendant to substitute for a new attorney at this point would have unreasonably disrupted the judicial process because his request was made during the *Ginther* hearing, and because defendant's current attorney was competent and willing to complete the *Ginther* hearing. Had

the trial court granted defendant's request, the *Ginther* hearing would have been unnecessarily delayed.<sup>6</sup> For the above reasons, we conclude that the trial court did not abuse its discretion in refusing defendant's request to substitute counsel during the *Ginther* hearing. We recognize that the trial court did not make direct reference to the requirements set forth in *Anderson* in allowing defendant to represent himself, but we conclude that the trial court complied substantially with these requirements. Defendant was adequately represented at trial and there is no reasonable possibility that the error complained of here so prejudiced defendant as to change the outcome of the *Ginther* hearing. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).<sup>7</sup>

Affirmed.

/s/ William C. Whitbeck  
/s/ David H. Sawyer  
/s/ Henry William Saad

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<sup>6</sup> Furthermore, even when defendant had representation, he continually second-guessed his counsel's trial strategy, interjected his own comments, and requested to question the witnesses himself.

<sup>7</sup> Defendant also claims that the trial court denied him his right to be present at his *Ginther* hearing by forcing him to represent himself from prison via telephone conference. A defendant has a right to be physically present at his trial. *People v Krueger*, 466 Mich 50, 51; 643 NW2d 223 (2002); MCL 768.3. This issue usually arises when a defendant is removed from the courtroom and cannot hear or see what is transpiring during the proceedings. In this case, however, defendant was representing himself. While he was not physically present during the final day of the *Ginther* hearing, he could hear what was going on via telephone. Not only was defendant aware of what was transpiring during the hearing, he was conducting the proceeding. Defendant has presented no evidence showing that the outcome of the proceeding would have been different had he examined his trial counsel in the courtroom rather than by telephone. Furthermore, when the trial court informed defendant that it would not bring defendant back to court from prison for the next session, defendant replied that he did not want to return to court because he did not feel that the conditions in the country jail were acceptable to him. Therefore, defendant has failed to show that the trial court committed a plain error affecting his substantial rights by requiring him to continue the *Ginther* hearing via telephone. *Carines, supra* at 763.